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No. 98-1511

IN THE

Supreme Court of the United States

CITY OF AUBURN, a municipal corporation of the State of Washington,

Petitioner,

v.

THE UNITED STATES GOVERNMENT and THE SURFACE TRANSPORTATION BOARD, an agency of the United States Government; KING COUNTY, a Washington municipal corporation; BURLINGTON NORTHERN SANTA FE CORPORATION, a Delaware corporation; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation; BURLINGTON NORTHERN SANTA FE ACQUISITION, INC.; and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF TUKWILA IN SUPPORT OF PETITIONER

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IN SUPPORT OF PETITIONER

I.

STATEMENT OF INTEREST

The City of Tukwila is a political subdivision of the State of Washington and files this brief pursuant to Rule 37.4 in support of the City of Auburn's Petition for Writ of Certiorari.

II.

INTRODUCTION

The land use planning efforts of local counties and cities seeking to coordinate and manage growth within their jurisdictional boundaries throughout the country will be severely impacted if the Ninth Circuit Court of Appeals' decision is allowed to stand. The City of Tukwila has been uniquely and recently impacted by the Ninth Circuit's decision. The City of Tukwila's situation graphically illustrates why the Ninth Circuit decision should be reviewed by the United States Supreme Court, and just how far the Ninth Circuit's decision reaches.[1] The Ninth Circuit Court of Appeals could not have intended its ruling to extend so broadly. Moreover, Congress did not contemplate that the Interstate Commerce Commission Termination Act (ICCTA) would reach so broadly.

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1. The City of Tukwila's situation is more fully discussed below.

Railroads, as community stakeholders, must be held accountable to the communities they dramatically affect to some minor degree. The Ninth Circuit's fear that local environmental review and permitting processes will prevent a rail carrier from constructing, acquiring, or otherwise taking actions that affect a line is unfounded. The regulatory burden of the local environmental review and permitting process is offset by provisions that require timely and expeditious permit processing, and which impose damages against local governments for delay in issuing permits or for arbitrary and capricious denials of permits. The Ninth Circuit's fear that local governments can somehow "prevent" necessary railroad projects is clearly misplaced.

III.

THE CITY OF TUKWILA'S SITUATION ILLUSTRATES THE REACH OF THE NINTH CIRCUIT'S DECISION

The City of Tukwila lies just south of and shares a common boundary with the City of Seattle. Tukwila is a city of approximately 14,000 residents. Its jurisdictional boundaries cover eleven square miles. Burlington Northern Santa Fe (BNSF) controls a large area of the City of Tukwila, approximately 19.2 acres immediately adjacent to a single family residential neighborhood and the Duwamish River. This is the site of BNSF's "Puget Sound Regional Hub," an intermodal transportation facility.

Truck access to BNSF's Puget Sound Regional Hub occurs over So. 124th Street in Tukwila. This is a narrow road passing through a single family residential area and passing directly in front of Tukwila's Community Center

facility. So. 124th Street is situated at the southern portion of the BNSF facility. This avenue for truck access has been utilized for several years.

Recently, the number of large trucks passing over So. 124th Street has escalated to approximately 800 large trucks per day, for a total of 1,600 daily trips to and from the BNSF facility.[2] Residents on and near So. 124th Street have complained of the hazardous conditions the increased number of trips creates, the noise and dust generated by the trucks, and the vibrations created by the volume of large trucks passing their homes.[3] The impact of the heavy truck traffic has adversely affected the existing public infrastructure and the surrounding community. The City is concerned for the safety of the children and elderly who use its Community Center on a daily basis.

The City is now in the process of studying the feasibility and cost of developing an alternative route for this truck traffic, which is projected to increase by 10 to 15 percent over the next five years. The City recently invested nearly $50,000 to study the feasibility of providing a northern access point to the BNSF facility at Airport Way South, a major arterial providing truck access to industrial areas of the City of Seattle and to the City of Tukwila. There are several other possible points of access to the BNSF facility that would alleviate the truck traffic through the residential

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2. 1,600 truck trips occurring over a 24 hour period results in an average of 66 trucks passing over So. 124th Street per hour.

3. The City of Tukwila has received complaints that house foundations have suffered structural damage due to the vibrations generated by the large trucks.

area. The City has budgeted $250,000 to provide signalization at the north access point.

The City recently held a public hearing on a proposed closure of So. 124th Street to truck traffic.[4] BNSF, despite the City's efforts to provide for alternative access, opposed closure of So. 124th Street to truck traffic. BNSF asserted that the Ninth Circuit Court of Appeals' decision, which is the subject of this petition for certiorari, prevents the City from closing So. 124th Street. Appended hereto as Appendix "A" is a copy of BNSF's letter to Tukwila's City Attorney on the proposed street closure. Thus, BNSF maintains that the Ninth Circuit's decision renders the City powerless to address the concerns of its citizens. Could this be the result the Ninth Circuit Court of Appeals envisioned when it rendered its decision? Could this be the intent of Congress when it passed the ICCTA?

The Court should also note that when the City initially spoke with BNSF regarding re-routing the truck traffic, BNSF indicated that it would not cooperate with the City unless BNSF first expanded its facility westward directly into the single family residential neighborhood. Such threatened expansion would occur, based on the Ninth Circuit Court of Appeals' decision, without regard to any impacts the expansion would have on Tukwila's residential community and without any requirement that BNSF comply with any local environmental review or permitting processes.

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4. The public hearing was conducted on two separate days, April 12, 1999 and April 19, 1999. A large number of business owners and residents testified at the hearings.

Based on this threatened expansion, the City of Tukwila moved to intervene, and an order permitting intervention was entered, in a United States District Court action involving the City of Auburn and BNSF.[5] One of the issues in that legal action is whether BNSF must comply with the City of Auburn's local environmental review and permitting process if BNSF expands its rail facility within Auburn. The City of Tukwila, as indicated above, has a similar concern. The United States District Court action was "stayed" pending any actual construction activity by BNSF or pending the decision of the Ninth Circuit Court of Appeals, which is the subject of the City of Auburn's Petition for Certiorari.

The City of Tukwila's desire to re-route truck traffic is solely brought on by its concern for its citizens. The City must protect and preserve the health, welfare, and safety of its citizenry. The proposed closure of So. 124th Street has absolutely nothing to do with the "economic regulation" of a rail carrier as contemplated under the ICCTA. A literal reading of the Ninth Circuit's decision, however, provides that, if BNSF feels any economic impact, the decision to close So. 124th Street is "economic regulation." BNSF asserts that, if it is required to utilize alternative access points to its facility, it will suffer varying degrees of economic impact. The City is, as a result of the Ninth Circuit's decision, powerless to protect its citizens.

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5. *City of Auburn v. King Co., et al.*, United States District Court for the Western District of Washington No. C96-1565-Z.

IV.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED. THE NINTH CIRCUIT'S DECISION IS BASED ON AN UNFOUNDED FEAR, AND ITS DECISION HAS BROAD IMPACTS NOT CONTEMPLATED BY THE ICCTA OR BY THE NINTH CIRCUIT COURT OF APPEALS.

The City of Tukwila is in agreement with the Ninth Circuit Court of Appeals to the extent that the Court of Appeals held that the ICCTA preempts local authority to "economically" regulate railroads. Tukwila cannot agree, however, that Congress intended to preempt local environmental review and land use permit processing when it passed the ICCTA effectively rendering cities powerless to take any action for the benefit of its citizens if there is any potential financial impact on a rail carrier.

Nearly nine years ahead of Vice President Al Gore's campaign for "smart growth," Washington State's Growth Management Act (GMA)[6] was enacted. This 1990 legislation was enacted in response to the problems associated with an increase in population and the resulting deterioration in quality of life. These problems include increased traffic congestion, school overcrowding, urban sprawl, and loss of rural lands. The reason for the adoption of the GMA is provided for in its opening section, RCW 36.70A.010, which states as follows:

> The legislature finds that uncoordinated and unplanned growth, together with a lack of

6. Revised Code of Washington Chapter 36.70A.

> common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.

The GMA imposed substantial new requirements on local governments. *Erickson & Assoc. v. McLerran*, 123 Wn.2d 864, 876, 872 P.2d 1090 (1994). Local governments are required to draft comprehensive plans, and must implement the plans with consistent development regulations. The comprehensive plans and development regulations leave virtually no stone unturned, setting forth land use designations, policies, and community visions. They also regulate land uses, housing, capital facilities, and utilities. The legislation mandates transportation planning, concurrency between growth and urban services, and traditional zoning. RCW 36.70A.070. Additionally, each local jurisdiction's comprehensive plan must be coordinated with its neighboring jurisdictions' comprehensive plan. RCW 36.70A.100.

The GMA also mandates an extensive public process when adopting these comprehensive plans. RCW 36.70A.140. Tukwila's own comprehensive plan represents thousands of hours of citizen, property owner, staff, and elected official participation, including BNSF's participation. In many cities, like Tukwila and Auburn, the railroads' participation in the planning process is critical to the long term viability of communities. Because BNSF is a major landowner and stakeholder in the community, its participation in the City of Tukwila's planning process is crucial. If BNSF is now considered exempt from this

community planning process and its results, the City's GMA dictated governing document is not worth the paper it is written on. If BNSF, despite the thousands of hours spent planning by citizens, City staff, and elected officials, decides to expand into the adjacent single family neighborhood without regard to the development regulations adopted in conjunction with this extensive planning, the community will be irretrievably wounded. Similarly, if the City is unable to address its citizens' concerns about heavy truck traffic through a residential neighborhood, the community suffers injury.

The City of Tukwila does not dispute that BNSF may seek the acquisition, operation, construction and expansion of its facilities. That acquisition, operation, construction and expansion can, notwithstanding the Ninth Circuit Court of Appeals' decision, still occur even if BNSF goes through a local environmental review and permitting process. The notions are not mutually exclusive. A literal reading of the Ninth Circuit's decision, however, provides that BNSF need not even sit at the table with local planning officials, based on an unsubstantiated fear that local environmental review and permitting processes could lead to the denial of railroad projects.

BNSF is protected by a plethora of State laws designed to facilitate expeditious permitting and to protect permit applicants from arbitrary or capricious denials of permits. The Ninth Circuit Court of Appeals' concerns about the regulatory impact on the railroad is, therefore, a concern without basis. The Ninth Circuit Court of Appeals noted:

> For if local authorities have the ability to impose "environmental" permitting regulations on the

> railroad, such power will in fact amount to "economic regulation" if the carrier is **prevented** from constructing, acquiring, operating, abandoning, or discontinuing a line.

(Emphasis supplied). *City of Auburn v. United States Government and the Surface Transportation Board*, 154 F.3d 1025, 1031. This concern is unfounded. In 1995, largely in response to complaints that the environmental permitting process was taking too long, the Washington State legislature adopted Chapter 36.70B RCW, the Regulatory Reform Act. The Regulatory Reform Act requires the expeditious processing of permits. RCW 36.70B.090 provides:

> (1) Except as otherwise provided in section (2) of this section, a local government planning under RCW 36.70A.040 shall issue its notice of final decision on a project permit application within one hundred and twenty days after the local government notifies the applicant that the application is complete, as provided in RCW 36.70B.070.

RCW 36.70B.090 was enacted as part of a comprehensive reform of the State's land use regulations incorporating recommendations from the Governor's Task Force on Regulatory Reform. In adopting these regulatory reforms, the legislature found and declared that one of its concerns was the "time needed to obtain local and state land use permits." RCW 36.70B.010(3). In RCW 36.70B.090, the legislature created a duty of timely processing. Accordingly, RCW Chapter 36.70B affords BNSF, and anyone else involved in the regulatory process, certainty

that their project will be permitted in a timely fashion. Damages and attorney fees are specifically available for arbitrary and capricious denials of permits by government officials in their land use capacities. There are sufficient safeguards in place to protect BNSF in the local permitting process.

V.

CONCLUSION

The Ninth Circuit Court of Appeals' decision provides BNSF with absolute power to do as it pleases without regard to any local regulations and without regard to the impacts its decisions may have on the local communities it dramatically impacts. The Ninth Circuit's decision to vest this unfettered authority in BNSF is provided in reaction to a situation that simply does not exist. The decision impacts and restricts the ability of a local community to address the life and safety concerns of its citizens any time a rail carrier may incidentally or potentially be financially impacted by a local decision. Such a local decision is not "economic" regulation as contemplated by the ICCTA. The Ninth Circuit's decision goes clearly beyond the intent of the ICCTA. The United States Supreme Court should, as a result, review the Ninth Circuit's decision.

Respectfully submitted this 21st day of May, 1999.

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APPENDIX

APPENDIX A — LETTER FROM DENNIS W. WILSON TO ROBERT NOE DATED APRIL 1, 1999

BNSF
Burlington Northern Railway
Santa Fe

Dennis W. Wilson
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April 1, 1999

VIA OVERNIGHT MAIL

Mr. Robert Noe
City Attorney
6200 Southcenter Blvd.
Tukwila, WA 98188

Re: Truck Access to BNSF's Puget Sound Hub Center in Tukwila

Dear Mr. Noe:

I am writing on behalf of The Burlington Northern and Santa Fe Railway Company regarding the proposed closure of 124th Street to truck traffic. BNSF is concerned that the

closure of 124th Street will block access to and from its Puget Sound Hub Center ("Hub Center") in Tukwila. As you know, the Hub Center provides essential intermodal rail transportation service for interstate commerce to and from the entire Puget Sound area. BNSF has worked with the City of Tukwila ("City") over the last two years to identify a reasonable alternative to 124th Street as a truck access route to the Hub Center. BNSF is prepared to continue such cooperative efforts. I want to emphasize the need to continue to work together on this issue, so that the City does not disrupt the operation of BNSF's intermodal facility or interfere with interstate commerce moving through the Hub Center. As discussed herein, this objective is in the interest of both the City and BNSF.

Currently, 124th Street provides the only reasonable access to BNSF's Hub Center. As discussed in greater detail in Tom Ison's letter to the City, attached hereto, truck access to the Hub Center from the north is not feasible without significant investments by the City. Thus, maintaining a truck route to continue to access the Hub Center from the south is vital to this facility's operation. The City's proposed closure of only a portion of 124th Street would not permit continued truck access to the Hub Center, because trucks could not safely navigate the steep grade of 129th Street to reach the portion of 124th Street that would remain open.

The City should carefully evaluate the effects of the actions that it is considering, in order to be certain that these actions do not interfere with reasonable access to BNSF's Hub Center. BNSF is a federally franchised interstate common carrier, regulated under the Interstate Commerce

Act, 49 U.S.C. § 10101, *et seq.* Interstate commerce is protected by the commerce and supremacy clauses of the U.S. Constitution. Accordingly, the Ninth Circuit Court of Appeals recently ruled that federal law preempts state and local regulation of railroads, in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). In that case, the Court held that certain regulations of King County could not be enforced where enforcement could interfere with BNSF'S rail operations. The Court held that any such state and local interference with interstate commerce is preempted by federal law, and therefore, is beyond the authority of a city or local government. Consequently, the City would be liable for damages under both Washington state and federal law if the City were to deny BNSF reasonable access to this facility, or cost BNSF intermodal business by threatening to deny such access.

For these reasons, BNSF believes that it is in the interest of the City, as well as BNSF, for the City to withdraw its proposal to close a portion of 124th Street at this time. If the City can develop and construct an alternative adequate truck access route to and from the Hub Center, BNSF would be agreeable to using that route so long as such use did not increase BNSF's costs. After such an alternative route is operational, BNSF would not oppose closing 124th Street. Until then, however, federal law requires that 124th Street remain open to truck traffic moving to and from BNSF's intermodal rail facility in Tukwila.

Appendix A

Very truly yours,

s/ Dennis W. Wilson
Dennis W. Wilson
Property and Transactions Counsel

cc: Mayor John W. Rants, City of Tukwila

Mr. Michael Burke, BNSF (via telecopy)
Mr. Steve Anderson, BNSF (via telecopy)
Mr. Tom Ison, BNSF (via telecopy)

Mr. Eric Laschever, Preston, Gates & Ellis
(via telecopy)